

DATE: April 28, 1995

CASE NO.: 94-INA-00138

In the Matter of:

POP'S HOMESTYLE COOKING,
Employer

On Behalf of:

LUCYNA GRZENDA,
Alien

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 28, 1992, Pop's Homestyle Cooking ("Employer") filed an application for labor certification to enable Lucyna Grzenda ("Alien") to fill the position of "Cook-Supervisor" (AF 55). The job duties for the position are:

Cook, prepare foods, take inventory, order groceries, and supervise the whole operation as well as other employees, plan daily menus (sic).

The requirements for the position are listed as two years training "Prepare Cooking-Foods." Further special requirements are listed as "Ethnic cooking, Polish & Yougoslavian (sic) Restaurant has 90 seating capacity. Golabki, Czarnina, Bigos, Pierogi."

The CO issued a Notice of Findings on June 10, 1993 (AF 51), proposing to deny certification on multiple the grounds. First, the CO found that a qualified U.S. worker was unlawfully rejected in violation of 20 C.F.R. § 656.20(c)(8), because he did not have ethnic cooking experience in Polish and Yugoslavian foods. Second, the CO found that the Employer failed to comply with the regulations by including his name, address, and telephone number in the advertisement.

Accordingly, the Employer was notified that it had until July 15, 1993, to rebut the findings or to cure the defects noted. Rebuttal was submitted on July 8, 1993 (AF 34), and the CO issued the Final Determination on October 29, 1993 (AF 31), denying certification.

On November 29, 1993, the Employer requested review of the Denial of Labor Certification (AF 1), and on December 9, 1993, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

The position in question here is that of a "Cook-Supervisor," and the requirements for the position are listed as two years training "Prepare Cooking-Foods," with a special requirement listed as "Ethnic cooking, Polish & Yougoslavian (sic) Restaurant has 90 seating capacity. Golabki, Czarnina, Bigos, Pierogi."

The CO denied certification primarily on the basis that at least one U.S. worker had been referred to the Employer who unquestionably had the necessary two years of training, but who was rejected for failing to meet the special requirements. It is obvious to us that the CO considered the special requirement to be unduly restrictive and not arising out of business necessity. Such was not directly stated by the CO in the Notice of Finding, however, but was so stated in the Final Determination. Indeed, the CO notes discrepancies in two copies of menus submitted by the Employer. One menu does not contain the ethnic foods listed in the special requirements, while the other appears to be a copy of the former with the latter being a revised copy which does contain those foods (AF 33). While the issue of whether the special requirement is unduly restrictive does not appear to have been clearly identified until the Final Determination, we need not remand this matter, as this case must be decided on other grounds.

Assuming, *arguendo*, that the Employer's special requirement is considered valid (*i.e.*, not unduly restrictive), the CO correctly notes that the Employer assumes that the U.S. applicant, Mr. Mullenix, did not have such experience, because he did not interview the applicant. Indeed, the Employer described Mr. Mullenix as "overqualified," based upon his resume.

Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant meets the requirements, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating (by an interview or otherwise) to determine whether the applicant meets all of the requirements. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*). To the same effect, see, *Hambrecht Terrel International*, 90-INA-358 (Dec. 11, 1991); *Nationwide Baby Shops, Inc.*, 90-INA-286 (Oct. 31, 1991); *I & N Consulting Engineers*, 90-INA-239 (July 31, 1991); *The First Boston Corp.*, 90-INA-59 (June 28, 1991).

The Employer's failure to interview Mr. Mullenix as well as two other applicants subsequently referred by the state agency is fatal to the application.

In view of this finding we need not address the remaining issue of whether the Employer's inclusion of his name, address, and telephone number in the advertisement is harmless error.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.